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NO. 86-364

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD W. BLAIR, et al.,

Petitioners,

v.

GLENN T. FREEMAN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Whether the Court below erred in holding that the applicable law, in 1982 and 1984, was "clearly established" so that state officials could reasonably be said to have "known" that an administrative inspection of a licensed commercial establishment, conducted pursuant to a pervasive regulatory scheme, was constitutionally objectionable under the Fourth Amendment to the United States Constitution.

II

Whether the Court below erred in holding that Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) did not apply to bar a procedural due process claim grounded under the Fourteenth Amendment to the United States

Constitution when one state official, in 1982, and another, two years later, failed to follow state statutory procedures governing license suspensions, which provided for due process, and an adequate post-deprivation remedy existed.

III

Whether the Court below erred in holding that the applicable law, in 1982 and 1984 was "clearly established" so that state officials could reasonably be said to have "known" that a pre-deprivation hearing was constitutionally required under the Fourteenth Amendment's Due Process Clause before officials could suspend a commercial establishment license.

IV

Whether the Court below erred in holding that the respective

secretaries of the South Dakota Department of Health were not absolutely immune from suit for their decisions, in 1982 and 1984, to suspend a commercial establishment license.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Plaintiffs and Respondents, Glenn T. Freeman and Lucy E. Freeman, Pro Se, will be referred to herein as "Respondents" or by name. Defendants and Petitioners Richard W. Blair, Douglas E. Kludt and Michael J. Baker have been parties in this litigation since its beginning. Petitioner Mark V. Meierhenry, was an original party in this litigation, dismissed, then reinstated. Lawrence J. Massa became a party in this litigation in 1984. They will be referred to collectively as Petitioners and individually by last name.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Glenn T. Freeman, Pro Se, on behalf of the Respondents, Glenn T. Freeman and Lucy E. Freeman, respectfully oppose the Petition for a

Writ of Certiorari filed by Mark V. Meierhenry, Attorney General for the State of South Dakota, and Mark A. Moreno, Special Assistant Attorney General for the State of South Dakota, on behalf of the Petitioners to review the opinion of the United States Court of Appeals for the Eighth Circuit in this law suit.

The Questions Presented for Review are at page (i) and (ii) of the Petition for Writ of Certiorari, and restated at page (i) and (ii) of this Opposition.

Parties to the Proceedings in the United States Court of Appeals for the Eighth Circuit are found at page (iii); Statement of Opinions at page (xii); Jurisdictional Statement at pages 1 and 2; and, Petitioner's Statement of the Case is found at pages 4 - 11, all of the Petition for

Writ of Certiorari.

Respondents' Restatement of the Case if found at pages 2 - 13 of this opposition.

The Opinion of the United States Court of Appeals for the Eighth Circuit is found in the Petitioners' Joint Appendix, Pages A-1 to A-49. The judgment of the Court of Appeals, Dated 4 June, 1986, appears in the Joint Appendix at Pages A-49 and A-50.

The opinions of the United States District Court, Central Division, District of South Dakota, denying Petitioners' Summary Judgment, dated 31 October, 1984; and later granting summary judgment on 25 April, 1985, are at Pages A-51 to A-76 in the Petitioners' Joint Appendix.

RESTATEMENT OF THE CASE

Glenn and Lucy Freeman own a small farm in Jackson County, South Dakota, upon which they have operated a campground since 1965 known as Belvidere East K.O.A. (hereinafter Belvidere KOA).

On 27 July, 1982, Petitioner Michael J. Baker, the Assistant Program Director for the South Dakota Department of Health (hereinafter the Department), and another Department employee, William T. Elliott arrived at Belvidere KOA and requested permission to conduct an inspection, citing two sections of South Dakota Codified Laws (SDCL) and the Administrative Rules of South Dakota (ARSD) as their authority to do so without a search warrant. The Respondents refused to allow the

inspection without a warrant, believing there was insufficient statutory and regulatory authority to enforce certain national codes and expressed a fear of a biased inspection. The Department officials departed without further incident.

The following day, Baker wrote a memorandum to Petitioner Richard W. Blair, (then) Secretary of the Department of Health, State of South Dakota, recommending suspension of the Freemans' campground license unless Blair thought a search warrant necessary. Blair contacted Petitioner Mark V. Meierhenry, Attorney General, State of South Dakota for advice. Meierhenry and Petitioner Douglas E. Kludt, an Assistant Attorney General, reviewed the South Dakota statutes and Kludt subsequently met with Blair and advised him that no warrant was

necessary to inspect Belvidere KOA. In the presence of Kludt, Blair then telephoned Glenn Freeman and arranged an appointment for the following morning although Freeman indicated that a search warrant was required prior to inspection.

Shortly after receiving the Blair call, the Freemans began receiving phone inquiries from news media personnel based in Pierre, South Dakota, the point of origin of Blair's call.

On the morning of 30 July, 1982, Blair, Kludt and Baker arrived at Belvidere KOA and in the presence of news media personnel and other witnesses requested permission to conduct an inspection. Glenn Freeman questioned the officials, believing there was insufficient statutory and regulatory authority to enforce certain national codes, refused to

allow an inspection of Belvidere KOA, whereupon, Petitioner Blair served an Order suspending the Respondent's license. The document had been prepared before Petitioner's arrival at the campground.

Immediately following the suspension, and before departing the premises of Belvidere KOA, Blair was interviewed by the press and stated that he wanted to make it ". . . clear that we're not saying there's anything wrong here . . .".

The Freemans posted a notice of the suspension for their patrons and operated for two days on a voluntary donation basis until their attorney had been contacted and the suspension order reviewed.

On or about 2 August, 1982, the Freemans were advised by their attorney that the license suspension

was unlawful. Thereafter, the Freemans resumed normal operation of their campground.

On 4 August, 1982, Respondents were served a notice of hearing, absent a date upon which the hearing was to be held. On 5 August, 1982, an amended notice of hearing was delivered by airplane to the Jackson County sheriff who served it upon the Respondents that evening, noticing them for the first time of hearing scheduled for 9 August, 1982.

On 6 August, 1982, Glenn Freeman called Kludt to complain about the short amount of time in which to prepare prior to the scheduled hearing and to seek an enlargement. During the conversation, Kludt made references to possible criminal prosecution of the Respondents for their failure to submit to a warrantless inspection.

Kludt refused to reschedule the hearing unless all operations at Belvidere KOA ceased. As a result of the adverse on-going publicity arising from the incident which was personally damaging the Freemans and their business experience and other considerations, Respondents, upon being promised unbiased inspectors, consented to permit an inspection.

On 10 August, 1982, an inspection of Belvidere KOA was conducted by Baker and another inspector. The condition of the campground was found favorable, however, Baker's written inspection report to Blair of 12 August, 1982, is inconsistent with his report of inspection made to the Freemans and statements he made on the premises at the time of the inspection.

In March, 1983, the Respondents filed this suit, alleging, inter alia, that their rights under the Fourth, Fifth and Fourteenth Amendments[2] had been violated by state officials. The Respondents named as defendants the State of South Dakota, The South Dakota Department of Health, Governor William Janklow, Meierhenry, Blair, Kludt and Baker. The state of South Dakota and the Department of Health were voluntarily dismissed as parties and the District Court dismissed Janklow and Meierhenry upon Petitioner's Motion[3].

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[2] Violation of Article VI, §§ 1, 2 and 11 of the South Dakota Constitution also was alleged. The appeals court determined that although these claims fall within the ancillary jurisdiction of the federal courts, determination of questions of state law are best left to the district court.

[3] The District Court subsequently reinstated Meierhenry as a party.

The remaining defendants moved for summary judgment, contending that no search warrant was required prior to inspection and that the summary suspension of the campground license was proper. The District Court held that summary judgment was inappropriate because the "plaintiffs were well within their Fourth Amendment rights" to require a search warrant and that the due process claim arising from the summary suspension of the Freemans' license therefore survived. Freeman v. Blair, No. 83-3026, slip op. at 6-7 (D.S.D. 31 Oct. 1984) Appendix A-59.

On 29 August, 1984, two persons who the Freemans did not know, alleging themselves employees of the department of health, however, bearing no credentials to identify them as such, appeared at Belvidere

KOA requesting permission to inspect[4]. The 1982 scenario replayed itself with the Freemans requesting a search warrant and the new secretary of health, Petitioner Lawrence J. Massa, summarily suspending the Freemans' license on the ground that the "public health, safety and welfare imperatively require immediate action", and scheduled a hearing which was postponed until 3 October, 1984. The hearing examiner concluded that "the [South Dakota] statutory authority invested in the Department pursuant to SDCL §§ 34-18-24 and 34-18-26 is insufficient to justify warrantless inspections". Third Amended Complaint, Ex. K. On 20 February, 1985, Massa lifted the

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4 No inspection of Belvidere KOA was requested or conducted in 1983 or 1985. SDCL 34-18-24 required only "periodic" inspections from 1982 to 1986.

license suspension, noting in a letter accompanying the order that "[t]he Department . . . has decided not to exercise its option to appeal the decision and, therefore, is bound by the ruling of the hearing examiner". Third Amended Complaint, Ex. L.

On 22 March, 1985, defendants again moved for summary judgment, claiming absolute and/or qualified immunity. The District Court, reversing its October 1984 decision, granted summary judgment and dismissed the Freemans' complaint with prejudice. The court held that Blair and Massa were entitled to absolute immunity because their decisions were "analagous" to a prosecutor's decision to commence prosecution. Freeman v. Blair, No. 83-3026, slip. op. at 7-7 (D.S.D. 25 April, 1985).

The court also concluded that the remaining defendants were entitled to qualified immunity. Id. at 5-6. The court observed that the Freemans were offered a post deprivation hearing several days following the suspensions and indicated that this comported with the requirements of due process. Id. at 6.

The Freemans appealed the decision of the District Court to the Eighth Circuit Court of Appeals where it was reversed. The court found, inter alia, that the officials were not entitled to qualified or absolute immunity; that the law was clearly established at the time of the incidents; that the Freemans were entitled to a search warrant; and, that the Freemans were entitled to a predeprivation hearing. Further, the

court found that if retaliatory action had been taken against the Freemans for their exercise of constitutional rights, such action would violate clearly established law.

The decision of the District Court was reversed and remanded for further proceedings consistent with the opinion. See Joint Appendix A-1 to A-50, 85-5169SD, 793 F.2d 166.

REASONS FOR DENIAL OF THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT PROPERLY FOUND THE LAW CONCERNING RESPONDENTS' RIGHT TO A WARRANT WAS "CLEARLY ESTABLISHED".

Respondents submit that the reasons set forth at pages 11 through 27 of the Petition are insufficient to cause this Court to accept the Petition. It is further submitted that Petitioners misapprehend the legal principles set forth in the Court's

decisions concerning administrative searches and seizures of commercial property. Camara v. Municipal Court, 387 U.S. 523(1967); See v. City of Seattle, 387 U.S. 541(1967); Colonnade Catering Corp. v. United States, 397 U.S. 72(1970); United States v. Biswell, 406 U.S. 311(1972); Marshall v. Barlow's, Inc., 436 U.S. 307(1978); Donovan v. Dewey, 452 U.S. 594(1981).

At issue is the reasonableness of a warrantless inspection of Respondents' premises, the Belvidere East K.O.A. Campground, under South Dakota Codified Laws (SDCL) 34-18-24 and 34-18-26, and the provisions of Administrative Rules of South Dakota (ARSD) 44:02:03, which are set forth in their entirety in the Joint Appendix (JA), at pages A88-89, and A-124 through A-138.

SDCL 34-18-24 requires that:

> "The secretary of health shall periodically inspect or cause to be inspected every . . . campground operating within this state for compliance with the provisions of this chapter and the rules and regulations of the department of health."

SDCL 34-18-26 (JA, Pg. A-89) permits the secretary, for the purpose of inspection:

> ". . . the right of entry and access to all areas of the building or structure and property on premise at any reasonable time."

The Court of Appeals, applying the standards of See, supra; Barlow's, supra; and Donovan v. Dewey, supra, found this broad grant of authority and discretion so unlimited that ". . . the Fourth Amendment and its various restrictive rules apply." Colonnade, 397 U.S. at 77, 90 S.Ct. at 777. (Footnote omitted)". Freeman v. Blair, 793 F.2d 166, 176(8th Cir. 1986). The Court of Appeals further

found that the law was "clearly established" at the time, such that Petitioners knew or should have known of the Respondents' right to demand a search warrant. Ibid.

Petitioners assert that these findings are contrary to this Court's decision in United States v. Biswell, supra, (Pet. Pg. 11), that they conflict with decisions of other federal courts of appeal and state courts of last resort (Id., at 23), and that a writ of certiorari should issue to resolve the matter, together with other cases raising allegedly similar issues. (Id., at 26,27.) A careful reading of Biswell, supra, Donovan v. Dewey, supra, and the decisions of other courts claimed to be conflicting, exposes this assertion to be without merit.

In Biswell, supra, the inspector's

authority was limited to inspections of (1) any records and documents required to be kept by a federally-licensed firearms dealer, and (2) any firearms or ammunition kept or stored by such a dealer, 406 U.S. at 311-312, such inspections to be made "during business hours". Ibid. The Court saw no constitutional difficulty with this authorization, as it furthered an urgent federal interest, the possibilities for abuse and the invasion of privacy were of unimpressive dimensions, and the inspections were a part of a scheme of pervasive regulation. Ibid., at 316-317.

In Donovan v. Dewey, supra, the administrative search provisions of the federal Mine Safety and Health Act of 1977 were found to be a constitutionally adequate substitute

for a warrant because the Act (1) defined the frequency of inspections, (2) set forth the standards for compliance, and (3) accommodated privacy concerns by prohibiting forcible entry, and requiring civil process for injunctive relief upon being refused entry. 452 U.S., at 604-605.

Unlike the narrow, specifically limited inspections authorized in Biswell, supra, and Donovan v. Dewey, supra, the Petitioners herein are authorized to enter ". . . all areas . . . at any reasonable time . . .", for the purpose of inspecting for ". . . compliance with the provision of this chapter and the rules and regulations of the department of health". (SDCL 34-18-24 & 34-18-26, JA, Pgs. A88-89.) Thus, the statutes devolve an almost unlimited discretion on the

Petitioners, leaving Respondents ". . . to wonder about the purposes of the inspector [and] the limits of his task". Biswell, supra, at 316.

In Marshall v. Barlow's, Inc., supra, an equally broad statute was construed as unconstitutional insofar as it authorized inspections without a warrant. 436 U.S., at 325. The Court there declared that:

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspections is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. (Footnote omitted.) Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. (Footnote omitted.) These are important functions for a warrant

> to perform, functions which underlie the Court's prior decision that the Warrant Clause applies to inspections for compliance with regulatory statutes. (Footnote and citations omitted). Ibid., at 323-324.

Beginning with the decision in See v. City of Seattle, supra, (1967) and culminating with Donovan v. Dewey, supra, (1981), this Court has consistently applied the above principles to cases concerning administrative searches of commercial property. During that entire time, one principle has remained fixed: where the legislature has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and it various restrictive rules apply. See Colonnade Catering Corp. v. United States, supra, at 77 (1970).

The statutes in question clearly authorize inspection but make no rules

governing the inspector's discretion. Therefore, the Court of Appeals correctly determined that the Fourth Amendment applied. Further, as the principles being applied were clearly set forth in this Court's decisions at least as early as 1970, and the principles remained unchanged to the time in question, the Court of Appeals correctly found the law was "clearly established" such that Petitioners knew or reasonably should have known that a warrant was required.

The decisions of other courts which are claimed to be conflicting (Pet. Pgs. 24-26), are readily distinguishable on their facts from the instant case, being cases concerned with pervasive regulatory schemes carried out under statutes properly limiting the inspector's discretion, and protecting the privacy

interests of the owners. An excellent case in point is the Appellate Court of Illinois decision, Marcowitz v. Dept. of Public Health, 106 Ill. App. 3d 422, 62 Ill. Dec. 319, 435 N.E.2d 1291 (1982). There, facilities licensed under the Ambulatory Surgical Treatment Center Act were subject to inspection authorized in writing by the director, at any reasonable time. The inspection includes examining the records and regulations of the facility, and the observation of surgical procedures and patient counseling, if the patient consents. Confidentiality of the medical records was covered by disclosure restrictions in the Act, and administrative and judicial review procedures were in place in the event an inspector was refused entry. Thus, there are clearly distinct differences

between the statutes and circumstances in issue here, and in the cases cited by Petitioners, which defeat Petitioners' claims of conflict.

Further, the cases pending before this Court, which Petitioners contend concern issues present in this case (Pet., Pgs. 26-27), are inapposite. People v. Krull, No. 85-608, revolves around an essentially moot issue, as the law in question has been amended. It concerns narrowly limited matters of consent to search and the validity, for criminal prosecution purpose, of a search conducted in good faith under a regulatory statute later found unconstitutional. See People v. Krull, 107 Ill.2d 107, 89 Ill. Dec. 860, 481 N.E.2d 703, 708-709(1985).

In Anderson v. Creighton, No. 85-5020, the issue is a very narrow immunity question, founded on a claim

that "objectively reasonable" conduct should provide qualified immunity from liability under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

New York v. Burger, No. 86-80, concerns a decision by the Court of Appeals of New York, People v. Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986), holding that administrative statutes authorizing warrantless searches are fundamentally defective if used solely to uncover evidence of criminality.

Thus, the principles of law and the facts in this case are distinguishable, easily, from the above. Therefore, as the Court of Appeals correctly applied this Court's prior decisions on administrative searches to the facts in this case, and properly found the law concerning Respondents' right to a warrant was

"clearly established", the Petition for Writ of Certiorari should be denied.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT PARRATT V. TAYLOR, AND HUDSON V. PALMER HAVE NO APPLICATION TO THE FACTS IN THIS CASE.

On 30 July, 1982, and again on 11 September, 1984, the Petitioners summarily suspended Respondents' campground license for Respondents' refusal to permit warrantless inspections of their premises. Said suspensions are governed by SDCL 1-26-29 (J.A., Pg. A-105) and SDCL 34-18-27 (J.A., Pg. A-90).

SDCL 1-26-29, declares that:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of the facts or conduct which warrant the intended action, and

> the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

SDCL 34-18-27, states in pertinent part that:

> The secretary of health, upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health, may, subject to the requirements of § 1-26-29, summarily suspend the license of any . . . campground . . . in the state.

Under this authority, summary suspension is contingent upon the determined existence of a hazardous condition dangerous to human life or detrimental to public health, and a finding that public health, safety, or welfare concerns imperatively require

emergency action.

On 30 July, 1982, Petitioner Blair, then Secretary of Health for the State of South Dakota, personally served Respondent Glenn Freeman with an order summarily suspending the license to operate the Respondents' campground upon Respondents' refusal to consent to a warrantless inspection. Petitioner Blair then admitted to witnesses and news media personnel that he had no knowledge of the existence of any hazardous condition, nor of any statutory violations in the premises.

On 11 September, 1984, following the receipt of a letter from Respondent Glenn Freeman, replying to an earlier letter from the health department requesting consent to inspect, and again refusing consent to warrantless inspection, Petitioner

Lawrence J. Massa [Petitioner Blair's successor in office] summarily suspended Respondents' campground license upon a conclusory finding that the public health, safety, and welfare imperatively required the action.

The Court of Appeals, reviewing Petitioners' claims that these acts were "random and unauthorized", and that prompt post-deprivation relief under South Dakota's common-law tort procedure was adequate for due process pursuant to Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984), rejected the claims under the principles recently announced in Pembaur v. City of Cincinnati, _____ U.S. _____, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). (J.A., Pgs. A-41 through A-43.)

The statutory procedure central to determining the process due the

Respondents herein is that set forth in SDCL 1-26-29, which declares that: "No . . . suspension . . . is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license". (J.A., Pg. A-105.)

The only exception to this procedure, which clearly mandates pre-deprivation notice and hearing, is for public health, safety, and welfare emergencies, specifically determined to be dangerous to life and/or detrimental to health, and imperatively requiring "quick action". See Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). The

Respondents' claim and exercise of their right to demand a warrant authorizing Petitioners' administrative search, as a matter of law, does not qualify as a public health "emergency" under the statutory scheme discussed above.

In the case of Simmons v. United States, 390 U.S. 377 (1968), this Court stated:

> Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. Ibid., at 394.

See also, Frost & Frost Trucking v. Railroad Commission, 271 U.S. 583, 593-594 (1926). In the circumstances of this case, the Respondents were entitled to the pre-deprivation "due

process" set forth in SDCL § 1-26-29, to wit: "notice by mail . . . of facts or conduct which warrant the intended action, and . . . an opportunity to show compliance with all lawful requirements . . .". This is Respondents' right, protected against deprivation and denial by the "due process" provisions of the Fourteenth Amendment. Petitioners, Meierhenry, Blair and Massa, heads of their respective agencies and policy makers for their departments, authorized the summary suspension of Respondents' campground license as retaliation and reprisal for Respondents' claim and exercise of their constitutional rights under the Fourth Amendment.

Thus, Parratt, supra, and Hudson, supra, have no application herein, as they concern unauthorized deprivations of property by low-level

state employees, not deliberate deprivations for retaliatory purposes, fully authorized and participated in by the heads of the responsible agencies. Rather, the principles set forth in Pembaur v. Cincinnati, supra, concerning the effect of decisions by policy-making officials, govern this case. The Court of Appeals properly applied these principles, and correctly decided that Parratt, supra, and Hudson, supra, had no application. Therefore, the petition should be denied on this issue.

III

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY FOUND THE LAW CONCERNING THE RESPONDENTS' RIGHT TO DUE PROCESS WAS CLEARLY ESTABLISHED.

Petitioners disingenuously seek to posture the circumstances as raising a question concerning the "clearly established" state of the law

regarding post-deprivation remedies. (Pet., Pg. 35.) As previously discussed, there is no merit to the position. South Dakota law, at the time in question, required pre-deprivation proceedings for all suspensions, except in those cases of bona fide emergencies, dangerous to life or detrimental to health. (SDCL §§ 1-26-29, 34-18-27; J.A., Pgs. A-90, A-105). Having provided this process by statute, the state cannot deprive the Respondents of this procedural right by reason of the Respondents' exercise of their Fourth Amendment rights. Petitioners have admitted from the beginning that the suspensions of Respondents' campground license were based solely on Respondents' refusals to consent to warrantless inspections of their premises. Thus, the suspensions

deprived the Respondents of their property right without due process, in violation of "clearly established" law.

In Shapiro v. Thompson, 394 U.S. 618 (1969), this Court declared that:

> If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional. (Citation omitted.)

See also, Dunn v. Blumstein, 405 U.S. 330, 338-343 (1972), (It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution); Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 283-284 (1977). Because the suspensions were the result of Respondents' exercise of their Fourth Amendment rights, and not for any emergency, denial of the statutorily mandated pre-deprivation

procedure violated "clearly established" law of which Petitioners knew, or reasonably should have known. Therefore, the Court of Appeals correctly found that Petitioners had no qualified immunity under Harlow v. Fitzgerald, supra, and the Petition for Writ of Certiorari should be denied.

IV

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT CORRECTLY DECIDED PETITIONERS BLAIR AND MASSA WERE NOT ENTITLED TO ABSOLUTE IMMUNITY UNDER BUTZ V. ECONOMOU.

The Petitioners claim that Petitioners Blair and Massa are entitled to absolute immunity for their decisions to summarily suspend Respondents' campground license is frivolous. In Butz v. Economou, 438 U.S. 478 (1978), this Court declared that:

> It makes little sense to hold that a government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority.
>
> * * * * * * * * * * * * * * * * *
>
> . . . Scheuer and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of c l e a r l y e s t a b l i s h e d constitutional limits will not interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, . . . executive officials exercising discretion are entitled only to the qualified immunity specified in Scheuer, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. (Footnote Omitted.) Ibid., at 506-508.

The statutory limit on Petitioners' discretion to summarily suspend Respondents' campground license is prescribed in SDCL §§

34-18-27 and 1-26-29. Section 34-18-27 vests the authority in the secretary of the department of health only ". . . upon determining the existence of a hazardous condition that may immediately endanger human life or be seriously detrimental to public health . . .", and subject to the requirement of § 1-26-29, that ". . . the agency finds that public health, safety, or welfare imperatively require emergency action, and incorporates a finding to that effect in its order . . .". (J.A., Pgs. A-90, A-105.)

The constitutional limit is imposed by the Fourth and Fourteenth Amendments, which secure the Respondents the right to refuse a warrantless inspection. Donovan v. Dewey, supra; Marshall v. Barlow's, Inc., supra; See v. City of Seattle,

supra.

The Petitioners admit that they had no knowledge of the existence of any hazardous condition when the Respondents' license was suspended. They likewise admit that the suspensions arose solely from the Respondents' refusals to permit warrantless inspections. Freeman v. Blair, 793 F.2d 166, at 169, n. 1, 177-178, n. 12; J.A., Pgs. A-6, n. 1, A-43-44, n. 12. Thus, Petitioners Blair and Massa, by their orders to summarily suspend the Respondents' campground license, are in the same boat with the official ". . . of higher rank who actually orders a burglary . . ." Butz, supra, at 506. The Court of Appeals correctly determined that, under the circumstances of this case, they were not entitled to absolute immunity.

Therefore, the Petition for Writ of Certiorari should be denied.

V

CONCLUSION

The United States Court of Appeals for the Eighth Circuit has properly applied the principles of this Court's decisions to the issues and facts in this case, and its ruling should not be disturbed. The law concerning the Respondents' constitutional rights was "clearly established" at the time, and Petitioners knew or should have known their conduct would trespass those rights. Therefore, based on the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated this 15 th

day of November, 1986.

Respectfully submitted,

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